Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 79-5962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

DANNY VINCENT, *Appellant,*

v.

STATE OF TEXAS, *Appellee.*

On Appeal From The Texas Court Of Criminal Appeals

BRIEF FOR APPELLANT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the State of Texas deprived Appellant of his liberty without due process of law when it revoked Appellant's probation pursuant to TEX. CRIM. PROC. CODE, Art. 42.12(8) (Vernon) without a preliminary hearing to determine probable cause for probation revocation as mandated by *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973).

2. Whether this appeal is "in time" under *U.S. Sup. Ct. Rule* 11 where Appellant's Notice of Appeal was not filed with the Texas Court of Criminal Appeals, but was filed with the District Court within the time allowed.

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BRIEF FOR APPELLANT

THE OPINION BELOW

The per curiam decision of the Texas Court of Criminal Appeals is unpublished [586 S.W.2d 880 (Tex.Crim.App. 1979)] and is found at J.A. 38. No other written opinions have been delivered.

JURISDICTION

The decision of the Texas Court of Criminal Appeals was entered September 19, 1979. Appellant timely filed a Motion for Rehearing En Banc in the Texas Court of Criminal Appeals on September 26, 1979. Vincent's Motion for Rehearing was denied October 10, 1979. The Notice of Appeal was filed in a Court possessed of the record [the 84th District Court of Ochiltree County, Texas] on January 4, 1980. As a precautionary measure, notice was purportedly mailed to the Texas Court of Criminal Appeals on January 4, 1980, but apparently was never received by that Court. The jurisdiction of this Court is invoked pursuant to 18 *U.S.C.* § 1253 (2) (1966)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

U.S. CONST. amend. XIV, § 1:

> . . . No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . .

The Statute in Question

TEX.CRIM.PROC.CODE ANN., Art. 42.12(8) (a) (Vernon):

> Sec. 8. (a) At any time during the period of probation the court may issue a warrant for violation

of any of the condition of the probation and cause the defendant to be arrested. Any probation officer, police officer or other officer with power to arrest may arrest such defendant without a warrant upon the order of the judge of such court to be noted on the docket of the court. A probationer so arrested may be detained in the county jail or other appropriate place of detention until he can be taken before the court. Such officer shall forthwith report such arrest and detention to such court. If the defendant has not been released on bail, on motion by the defendant the court shall cause the defendant to be brought before it for a hearing within 20 days of filing of said motion, and after a hearing without a jury, may either continue, modify, or revoke the probation. The state may amend the motion to revoke probation any time up to seven days before the date of the revocation hearing, after which time the motion may not be amended except for good cause shown and in no event may the state amend the motion after the commencement of taking evidence at the hearing. The court may continue the hearing for good cause shown by either the defendant or the state. If probation is revoked, the court may proceed to dispose of the case as if there had been no probation, or if it determines that the best interests of society and the probationer would be served by a shorter term of imprisonment, reduce the term of imprisonment originally assessed to any term of imprisonment not less than the minimum prescribed for the offense of which the probationer was convicted.

Other Statutes Involved

TEX.CRIM.PROC.CODE ANN. Art. 42.12(3)(b) (Vernon):

Sec. 3b. Where probation is recommended by the verdict of a jury as provided for in Sec. 3a above, a

defendant's probation shall not be revoked during his good behavior, so long as he is within the jurisdiction of the court and his residence is known, except in accordance with the provisions of Section 8 of this Article. If such a defendant has no counsel, it shall be the duty of the court to inform him of his right to show cause why his probation should not be revoked; and if such a defendant requests such a right, the court shall appoint counsel in accordance with Articles 26.04 and 26.05 of this Code to prepare and present the same; and in all other respects the procedure set fourth in said Sec. 8 of this Article shall be followed.

TEX.CRIM.PROC.CODE ANN. Art. 26.04(b) (Vernon):

(b) The appointed counsel is entitled to ten days to prepare for trial, but may waive the time by written notice, signed by the counsel and the accused.

TEX.CRIM.PROC.CODE ANN. Art. 40.09(1) (Vernon):

1. *Record in Appeals to the Court of Criminal Appeals.*

In all cases appealable by law to the Court of Criminal Appeals, the clerk of the court that entered the conviction sought to be appealed from shall, under his hand and seal of the court, make and prepare an appellate record comprising a true copy of the matter designated by the parties, but shall always include, whether designated or not, copies of the material pleadings, material docket entries made by the court, the charge, verdict, judgment, sentence, notice of appeal, any appeal bond, all written motions and pleas and orders of the court, and bills of exception. The matter so prepared shall be assembled under one cover and shall constitute the record on appeal. The pages of

this record shall be numbered consecutively and there shall be an index prepared by the clerk showing the location of each document in the record. The record shall be made in duplicate and one copy shall be retained by the clerk for use by the parties with permission of the court.

STATEMENT OF THE CASE

On May 23,1977, Appellant, Danny Vincent ("Vincent"), pled guilty to a charge of burglary in the District Court, Ochiltree County, Texas (the "Trial Court"). (J.A. 3). The Trial Court fined Vincent, sentenced him to six years in the Texas Department of Corrections, suspended imposition of Vincent's prison sentence and attached as two of the conditions of his probation that he commit no offense against the laws of Texas and refrain from drinking intoxicants. (J.A. 3-11).

On February 6, 1978, Vincent was arrested on the State's Supplementary Motion for Warrant to Revoke Probation which alleged, among other things, that Vincent had been driving while intoxicated and had not refrained absolutely from drinking intoxicants. (J.A. 16-22). On February 6, 1978, the Trial Court set March 27, 1978 as the date for hearing the State's motion to revoke on the merits. (J.A. 23). Vincent received notice of the hearing on March 2, 1978. (J.A. 25). On March 24, 1978, counsel was appointed for Vincent. The Texas Statutory Authority for revocation of probation is TEX.CRIM.PROC.CODE Art. 42.12(8)(a) (Vernon) ("The Texas Statute").

On March 27, 1978, Vincent objected to the proceedings on the following grounds, among others:

> 1. Failure to grant Vincent the right to a preliminary hearing, as promptly as convenient after arrest, and notice thereof, to determine probable cause for believing that the probation conditions had been violated under *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973) and *Morrissey* v. *Brewer,* 408 U.S. 471 (1972).
>
> 2. Revocation of probation without a preliminary hearing was expressly prohibited by the due process clause of the Fourteenth Amendment to the United States Constitution.
>
> 3. The Texas Statute was unconstitutional on its face, and as applied to him, for failing to provide for the preliminary hearing and attendant safeguards mandated under the Fourteenth Amendement to the United States Constitution, as interpreted by *Gagnon* v. Scarpelli, 411 U.S. 778 (1973) and *Morrissey* v. *Brewer,* 408 U.S. 471 (1972).

The Trial Court overruled each of these objections.

On April 10, 1978, the Trial Court found Vincent to have violated his probation conditions, revoked his probation and sentenced him to not less than 2 nor more than 6 years in the Texas Department of Corrections. (J.A. 32). Asserting the objections detailed above, Vincent timely appealed to the Texas Court of Criminal Appeals.

The Texas Court of Criminal Appeals affirmed the Trial Court's judgment. The per curiam decision states, in part:

> Both grouds complained of the failure of the Texas system of probation to provide a preliminary hearing of the kind discussed in *Scarpelli* . . . This argument was rejected in *Whisenant v. State*, 557 S.W.2d 203, and it does not require further discussion today. (J.A.38).

SUMMARY OF ARGUMENT

1. Texas revoked Vincent's probation without affording him a preliminary hearing to determine probable cause for the alleged probation violations. Applying *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) to probation revocations, *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1972) required a two-step procedure in probation revocation to comport with fundamental notions of due process. The initial step—the probable cause hearing—is not only ignored by Texas statutes, but also is dismissed by the Texas Court of Criminal Appeals as being inapplicable to that process which Texas perceives to be due. The Texas scheme for probation revocation can, and in Vincent's case did, result in substantial deprivation of liberty by reason of the very evil *Morrissey and Scarpelli*, sought to end; *i.e.*, prolonged incarceration with no determination of probable cause. Because Texas is required to provide a speedy hearing only upon an incarcerated probationer's motion (which, if not asserted, is waived); because bail is discretionary in probation revocation proceedings; and because counsel need not be

appointed until ten days prior to the hearing on the merits, the probability of prolonged incarceration without an independent determination of probable cause is very real.

2. In respect of the proper filing of Vincent's Notice of Appeal, *U.S. Sup. Ct. Rule* 11, 28 *U.S.C.* requires only that the Notice of Appeal be filed "with the clerk of the court possessed of the record" within ninety (90) days after the entry of the final judgement from which the appeal is taken. Vincent's Notice of Appeal was timely filed with the Texas trial court which had the responsibility for preparing the state appellate record, which maintained a copy in its office, and which possessed a record of the proceedings. Although the Notice of Appeal could also have been filed with the Texas Court of Criminal Appeals (an unsuccessful attempt to do so was apparently made), this appeal should not be dismissed on that ground alone.

ARGUMENT

Proposition I

The Texas Statute is unconstitutional on its face, and as applied to Vincent, where it fails to require a preliminary hearing to determine probable cause that the conditions of probation have been violated.

By unanimous decision, this Court in *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 (1973), held that a preliminary hearing to determine if probable cause exists

to believe that the probationer has violated the terms of his probation is required after arrest and prior to a later revocation hearing, under the standards of *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). In *Morrissey*, the Court found that the loss of a parolee's conditional freedom includes many of the "core values of unqualified liberty," and thus entitles the individual in jeopardy to some process, however informal, before his conditional freedom can be revoked. *Id.* at 482. Revocation is necessarily a two-step procedure if it is to comport with the requirements of due process. *Id.* at 485. The Texas Statue completely ignores the first step in the required due process procedure; *i.e.*, the requirement of a preliminary hearing to determine probable cause "at or reasonably near the place of the alleged. . . violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available."*Id.* Without the preliminary hearing, the Texas statutory scheme can result in substantial infringement of that process which is due.

In the first instance, the Texas Statute makes it the duty of the probationer to request a hearing on the merits be held within 20 days of the filing of a motion to revoke probation. Even though this has been construed as a mandatory provision by the Texas Court of Criminal Appeals [*Carney* v. *State*, 573 S.W.2d 24 (Tex.Crim.App. 1978)], the burden is on the probationer to assert this right. Consequently, a speeding hearing on the merits is mandatory only if the probationer knows of this right and asserts it.

Secondly, a probationer is not entitled, as a matter of right, to bail during pendency of probation revocation proceedings. Bail is discretionary. *Ex Parte Ainsworth*, 532 S.W.2d 640 (Tex.Crim.App. 1976); *Valdez* v. *State*, 508 S.W.2d 842 (Tex.Crim.App. 1973).

Third, although counsel may be appointed upon proper application, counsel need not be appointed until ten days prior to the hearing. TEX.CRIM.PROC.CODE ANN. Arts. 42.12(3)(b) and 26.04(b).

The constitutional infirmities with such a procedure are readily apparent. The probationer can be held indefinitely (a) without the benefit of application for discretionary bail, (b) without the benefit of counsel, (c) without knowing of the evidence against him, (d) without being afforded the opportunity to examine witnesses, and (e) without the benefit of a determination that he is being held with probable cause. The only way that the probationer can secure a relatively speedy hearing, is to assert that right by motion. But the very real possibility exists that a probationer may be incarcerated for a substantial period of time without the knowledge of his right to assert the 20 day mandatory hearing time. In fact, possibility became reality for Vincent.

Vincent was imprisoned with no determination of probable cause for one and one-half months prior to his revocation hearing. The order setting the hearing date of March 27, 1978 was made on February 6, 1978. However, Vincent received no notice of that hearing until March 2, 1978. The notice of hearing provided, in

part, that Vincent had the right to be represented by an attorney of his choice at such hearing, to cross examine witnesses for the State of Texas and to offer evidence in his behalf. Consequently, Vincent was held in jail, without the benefit of counsel, for a period of one month before receiving written notice that he had the right to be represented by an attorney, to cross examine witnesses for the State of Texas and to offer evidence in this behalf. Under such circumstances, the vaunted 20-day "mandatory" hearing time under the Texas Statute provides no protection against the evils defined by *Morrissey* v. *Brewer*.

Texas' position on the non-application of *Scarpelli* to the Texas Statute represents a curious twist of constitutional reasoning. Prior to *Scarpelli*, the Texas Court of Criminal Appeals held that where a state provides for probation and revocation proceedings as part of its criminal process (even though not constitutionally required to do so), "then due process and equal protection of the law are fully applicable thereto." *Campbell* v. *State*, 456 S.W.2d 918, 921 (Tex.Crim.App. 1970). *Campbell* noted that it would "be difficult to conclude that probation revocation hearings are not criminal proceedings where substantial rights of the accused may be affected." *Id.*, citing *Mempa* v. *Rhay*, 389 U.S. 128 (1967). In post-*Scarpelli* decisions, the Texas Court of Criminal Appeals extended to probationers Fourth Amendment protection against illegal searches and seizures and Fifth Amendment protection against improperly obtained confessions. *Tamez* v. *State*, 534

S.W.2d 686 (Tex.Crim. App. 1976); *Dowdy* v. *State*, 534 S.W.2d 336 (Tex.Crim.App. 1976). The same court has even reversed orders revoking probation where there is overwhelming evidence to support such orders, when the state's pleadings were not sufficient to give the probationer "fair notice of the conduct or acts" for which the state intended to offer evidence to prove a violation of the conditions of probation. *Burkett* v. *State*, 485 S.W.2d 578 (Tex.Crim.App. 1972).

Given these Texas Court of Criminal Appeals' decisions, it might appear that Texas has protected a probationer's right to due process of law. However, these protections go only to the hearing on the merits — the second step in the *Scarpelli* due process. In a rather inconsistent series of three cases, Texas has refused to follow the *Scarpelli* mandate of a preliminary hearing. These cases have arisen because The Texas Statute does not require the preliminary hearing. An analysis of the three cases in order indicates that the Texas Court of Criminal Appeals has bootstrapped Texas law in this area based on a faulty perception of one of its own cases.

The first case was *Ex Parte Shivers*, 501 S.W.2d 898 (Tex.Crim. App. 1973). When faced with the issue of a probationer's right to counsel at a probation revocation hearing, the court in *Shivers* held that *Scarpelli* did not apply to Texas revocation proceedings. Shivers had been given life imprisonment for burglary with intent to commit theft. *Id.* at 899. Shivers petitioned for a writ of habeas corpus, contending that one of his previous convictions could not be used for the

enhancement of sentence since he had been without counsel when his probation was revoked. *Id.* The State sought to invoke *Scarpelli*, maintaining that this Court's case-by-case rule for appointment of counsel gave Shivers no absolute right to counsel at his probation revocation hearing. *Id.* at 900. Despite *Scarpelli*, the Texas Court granted relief, holding that without counsel at the hearing the previous conviction could not be used for enhancement. *Id.* at 899.

Shivers turned on the fact that probation was granted by suspending the imposition of sentence, rather than suspending the execution of sentence. The *Shivers* court reasoned that the *Scarpelli* case-by-case rule for providing counsel was limited to revocation hearings outside the criminal proceeding where the probationer had been sentenced at the original trial and only execution of the sentence was suspended. However, the Court notes that *Mempa* v. *Rhay*, 389 U.S. 128 (1967), held that counsel was required at every stage of a criminal proceeding where a defendant's substantial rights were affected. Since Texas suspends the imposition of sentence at the original trial, sentencing (a critical stage of the criminal process) takes place at the revocation. Consequently, the hearing is part of the criminal process within the ambit of *Mempa*. *Ex Parte Shivers*, *supra* at 899. Thus, the *Shivers* court held that the *Mempa per se* rule for providing counsel, not the *Scarpelli* case-by-case rule, is applicable in Texas probation revocation hearings. *Id.* at 901.

In *Grant* v. *State*, 505 S.W.2d 259 (Tex.Crim.App. 1974), the court relied on *Shivers* to hold that the

Scarpelli preliminary hearing was not required in Texas, when in fact *Shivers* did not address that portion of *Scarpelli*. Finally, relying on *Shivers* and *Grant*, the court in *Whisenant* v. *State*, 557 W.W.2d 102, 105 (Tex.Crim. App. 1977), recognized that Texas procedure affords no preliminary hearing, yet contended that the state's revocation process gives the accused more due process protection than required by *Morrissey* and *Scarpelli*.

Ironically, by relying on a decision which avoided *Scarpelli* in order to give an indigent *more* protection than that case might otherwise require, the Texas Court of Criminal Appeals has held that Texas procedure does not even require the "minimal" requirements of due process which *Scarpelli* mandated; *i.e.*, a preliminary hearing with notice, an impartial decision maker, a conditional opportunity to confront adverse witnesses, and a record of the hearing. As one scholar has stated, "the holding of the Texas Court of Appeals in *Whisenant* appears to be clearly erroneous." Hippard, "Annual Survey of Texas Law", 33 *S.W.L.J.* 505, 558 (1979). *See also*, Bissex, "Scarpelli: A Mandate for Change of the Due Process of Law Requirements in Texas Probation Revocation Hearings," *Hou.L.Rev.* 895 (1974).

Although Texas procedure may provide the minimum requirements of due process as to the actual revocation hearing, it certainly has turned a deaf ear to the first step in the minimum due process required — a preliminary hearing which must be had to warrant incarceration of a probationer until his final hearing. The

possibility — even the probability — exists that an accused will have no counsel nor be aware of his right to have counsel; will not be aware of nor be able to invoke his right to seek bail, and will not be aware that he has the right to demand a hearing within twenty days of his arrest where bail is not granted. Any argument that Texas provides a hearing within a reasonable time is illusory. The state may hold the hearing at its leisure while the accused remains incarcerated because of an alleged "violation" for which there has been no determination of probable cause.

PROPOSITION II

Vincent timely filed his Notice of Appeal under U.S. Sup. Ct. Rule 11(1), 28 U.S.C.

U.S. Sup. Ct. Rule 11, 28 U.S.C. ("Rule 11') states that an appeal to review the judgment of a state court of last resort in a criminal case "shall be deemed in time" when the notice of appeal prescribed by Rule 10 is "filed with the clerk of the court possessed of the record" within ninety (90) days after the entry of such judgment and the case is docketed within the time provided in Rule 13." The assertion has been made that this appeal was not timely filed since no Notice of Appeal was filed with the Texas Court of Criminal Appeals within the time permitted by Rule 11. Notice of Appeal was filed with the District Court of Ochiltree County, Texas on January 4, 1980.

The four cases originally cited by the State of Texas in its Motion to Dismiss are inapposite.[1] Each is a memorandum decision which states simply that the appeal was dismissed where not timely filed. In this case, the requisite Notice of Appeal was filed with a court possessed of the record. The only question is whether it was filed in the proper court. Consequently, none of the cited cases deal with question at hand.

Under Article TEX.CRIM.PROC.CODE ART. 40.09(1) (Vernon), the clerk of the court that entered the conviction sought to be appealed shall make and prepare an appellate record comprising "a true copy" of the matter designated by all parties. The matter so prepared shall be assembled under one cover and shall constitute the record on appeal. The record is to be made in duplicate and one copy is to be retained by the clerk for use by the parties with permission of the court. Consequently, under Texas procedure, the Court of Criminal Appeals has a record and the District Court has a record. Out of an abundance of caution, Vincent sought to file his Notice of Appeal in both courts, but for some unknown reason the Notice of Appeal was never filed with the Texas Court of Criminal Appeals.

Vincent has found no cases dealing with the precise point in issue. However, under a strict reading of the state statute, the original record remains with the clerk of the trial court and the copy becomes the appellate

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[1] *Richardson* v. *Blumenthal*, 435 U.S. 939 (1978); *Gabriel* v. *United States*, 429 U.S. 887 (1976); *Charger Investments Inc.* v. *Corbett*, 429 U.S. 877 (1976); *Taggart* v. *New York*, 392 U.S. 667 (1967).

record insofar as the state appeals process is concerned. Vincent respectfully submits that this court should not dismiss so important an appeal upon obscure points as to which court was "possessed of the record", where a Notice of Appeal was filed in a court possessed of the record. The new Rule 11.1, effective June 30, 1980, eliminates any in the old Rule 11 uncertainty by requiring the Notice of Appeal to be filed with the clerk of the court "from whose judgment the appeal is taken." Consequently, a decision in favor of timely filing would not affect future appeals nor would it create any uncertainty in the plain meaning of the new Rule 11.1.

CONCLUSION

Vincent requests this Court to either (a) reverse the order revoking his probation and direct the dismissal of the Texas proceedings resulting in said order, or, in the alternative, (b) reverse the order revoking his probation and remand the case for a determination of probable cause for the allegations in the State's Supplementary Motion to Revoke.

Respectfully submitted,

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